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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 898.

JOHN ALAN APPLEMAN and JEAN G. APPLEMAN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the Seventh Circuit.

REPLY BRIEF FOR APPELLANT.

JOHN ALAN APPLEMAN,
The Maples,
Urbana, Illinois 61802,
JEAN APPLEMAN,
1355 North Sandburg Terrace,
Chicago, Illinois 60610,
Attorneys for Petitioners.

JOHN ALAN APPLEMAN,
Of Counsel.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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The Government has managed in an excellent fashion to solve the case by assuming the answer it is trying to reach. No, it says, phloem necrosis can not be a casualty because no disease can be a casualty. After all, it is expected. And in so making that statement, it ignores its own admissions that the test of a casualty loss depends on the factual circumstances of the case.

For example, termite losses are fairly common. The yellow pages of any city directory indicate the vast business performed by exterminators. Yet, if the loss is sudden it will still be a casualty loss (Rosenberg v. Commissioner, C. A. 8, 198 F. 2d 46; Shopmaker v. United States,

D. C. Mo., 119 F. Supp. 705; Buist v. United States, D. C. S. C., 164 F. Supp. 218; E. G. Kilroe, 32 T. C. 1304; Henry F. Cate, Jr., 21 T. C. M. 1146; and Alan M. Winsor, 18 T. C. M. 383)—even the Government admitted this until it lost the present case in the trial court.

In our first brief, we spoke of the numerous types of losses which have been held to be casualty losses; damages caused by flood, drought, sonic boom, automobile accident, vandalism, and occupation by troops among others. The Government at no place attempted to explain how these varied so greatly from losses caused by an epidemic carried by an insect, that the latter could be excluded, as a matter of law, from the class of casualties.

Moreover, the Government speaks, at page 7 of its brief, of the *Burns* case (174 F. Supp. 203, affirmed per curiam, 284 F. 2d 436) as being "very similar." How? That case dealt with a curable disease; ours was one which is, as admitted in the Government's brief, incurable and incapable of being prevented. One is sudden, as was found by the jury; the other, Dutch Elm Fungus, is slow to kill and easy to arrest. The court may or may not have been right in holding that such a fungus did not create a casualty loss, but, certainly, its dictum, in saying that any loss occasioned by disease is not a casualty loss, was not called for by the facts of its case. It was there suggested that there is nothing unusual in a tree dying from disease—perhaps not, but it is most unusual for all of one's trees, when there are so many, to be suddenly killed in an epidemic which one is incapable of preventing.

The term disease, as pointed out on page 13 of our Petition for Writ of Certiorari, is a general term. It merely refers to any morbid change in a tissue or abnormal state of a body. It could as easily apply to the state of a tree dying from lightning as to one dying from phloem necrosis. Indeed the two instances are parallel. In both, the

death of the tree is caused by a sudden strike; the tree then quickly rots away. And the same appellation could be applied to death from blizzard or drought. But the mere fact that a blizzard causes a tree to die from disease or that a drought causes a tree to die from disease has not been held to alter the applicability of the normal test of casualty. Those tests have never been, what caused the casualty but what was the nature of the loss—was it sudden, unusual or unexpected. Unfortunately, war losses are common today; so are those caused by automobile accidents. Yet, they are casualty losses. To generalize is always dangerous, yet this is exactly what both the Government and the *Burns* case have done. And to generalize here is to defeat the purpose of Congress, which was, seemingly, to protect taxpayers against costly, sudden, and unexpected losses, particularly when unavoidable, regardless of any arbitrary appellation.

There is one further statement in the Government's brief that should be modified. There is a suggestion that casualty should simply be equated with accident. But droughts are not accidents; a freeze is not an accident; a gradual (five-year) sinking of soil is not an accident (nor is it sudden); occupation of troops is not an accident. Yet these have all been held to create casualty losses. Buttram v. Jones, D. C. Okla., 87 F. Supp. 322; United States v. Barret, C. A. 5, 202 F. 2d 804; Harry Johnston Grant, 30 B. T. A. 1028, Acq. XIII-2 C. B. 8; Charles Gutwirth, 40 T. C. 666 at 679, 680. The equation of casualty with accident is indeed unfortunate and may explain the confusion over the term "disease." For throughout the years, words "disease" and "accident" have been juxtaposed as contrasting terms. This Court will remember the great battles fought over whether sunstroke was an accident or a disease (see 1 A Appleman *Insurance Law and Practice*, § 447). But such conflict does not exist between "casualty" and "disease" per se. If the "disease" was sudden, unusual, or unexpected, it could still be a casualty

and, even in layman's parlance, epidemics are often thought of as casualties.

The jury determined that the sudden wiping out of all the trees had all the earmarks of a casualty. And the Government in appealing did not object to the finding of the jury nor did it claim that the findings of the jury were manifestly contrary to the weight of the evidence. It has merely claimed that considering only the evidence favorable to the plaintiff and not weighing conflicting evidence, the case should not have gone to the jury at all. The Government asserted, rather, that such a loss could never be unexpected. This seems hard to believe when in 1952, just four years before the losses, the disease was unheard of at a leading school in plant pathology, the University of Illinois, as Mr. Bennett testified. The Government states that the appellants have cited no cases to support their position that a loss caused by "disease" can be a casualty; but neither has the Government cited any holding that a loss, unusual, sudden, unexpected, and incapable of being prevented is automatically excluded from the class of casualty losses merely because the appellation "disease" could be applied to it.

We believe that the other courts are correct in holding that the nature of a casualty depends on the facts and not on terms and that the same type of loss might be a casualty or not, depending on, principally, whether or not it was sudden. Compare United States v. Rogers, C. A. 9, 120 F. 2d 244, modified on rehearing, 122 F. 2d 485; Fay v. Helvering, 120 F. 2d 253, Rosenberg v. Commissioner, C. A. 8, 198 F. 2d 46; E. G. Kilroe, 32 T. C. 1304; Shopmaker v. United States, D. C. Mo., 119 F. Supp. 705; Buist v. United States, D. C. S. C., 164 F. Supp. 218; Henry F. Cate, Jr., 21 T. C. M. 1146; Alan M. Winsor, 18 T. C. M. 383; Rev. Rul. 59-277, C. B. 1959-2, 73. To change horses now and place all emphasis on unforeseeability is to remove most would-be casualty

losses such as landslides, earthquakes, drought, and blizzards from this class. For this reason, we ask for the court to accept and reverse this case.

Respectfully submitted,

JOHN ALAN APPLEMAN,
The Maples,
Urbana, Illinois 61802,
JEAN APPLEMAN,
1355 North Sandburg Terrace,
Chicago, Illinois 60610,
Attorneys for Petitoners.

JOHN ALAN APPLEMAN,
Of Counsel.

Proof of Service.

I, John Alan Appleman, one of the attorneys for John Alan Appleman and Jean G. Appleman, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 19 day of March, 1965, I served copies of the foregoing On Petition for Writ of Certiorari to the Court of Appeals of the Seventh Circuit, Reply Brief for Appellant, on the United States by mailing copies in duly addressed envelopes, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C., 20530 and to J. Edward Shillingburg, Esq., Department of Justice, Washington, D. C. 20530.

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John Alan Appleman.